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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAHAR MOHAMMADIAN et al., Plaintiffs and Respondents, v. FRY'S ELECTRONICS, INC., Defendant and Appellant.	D059200 (Super. Ct. No. 37-2010-00086990-CU-OE-CTL)

APPEAL from an order of the Superior Court of San Diego County, Lisa Foster, Judge. Reversed and remanded with directions.

Defendant Fry's Electronics, Inc. (Defendant) appeals an order denying its petition to compel arbitration of the action filed by plaintiffs Sahar Mohammadian and Michael Spencer (Plaintiffs), individually and on behalf of all other similarly situated current or former employees of Defendant. The trial court found the arbitration agreement between the parties to be both procedurally and substantively unconscionable and therefore unenforceable. On appeal, Defendant contends the trial court erred because the case on

which it based its finding of substantive unconscionability, *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*), was overruled by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) ___ U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*AT&T*). We reverse the order because *AT&T* undermines the basis for the trial court's ruling, but remand with directions that the court reconsider its ruling. We express no opinion on whether the petition should be granted or denied by the trial court on further consideration.

FACTUAL AND PROCEDURAL BACKGROUND

Mohammadian is a current employee of Defendant, having been employed as a nonexempt sales associate since September 2002. Spencer is a former employee of Defendant, having been employed as a nonexempt sales associate from January 2002 through about October 2010. Until about December 2009, Mohammadian and Spencer earned compensation through both a minimum hourly wage and commissions earned. After December 2009, they earned compensation solely through commissions earned.

In June 2005, Mohammadian and Spencer each signed a one-page arbitration agreement (Agreement) prepared by Defendant, providing:

> "**I**. **Agreement to Arbitrate** - In consideration of the continuation of the employment relationship, [Mohammadian/Spencer (Associate)] and [Defendant (Employer)] hereby agree that *any and all disputes between Associate and Employer* (including related disputes between Associate and other associates or agents of Employer and entities legally related to Employer) *arising from or in any way related to Associate's employment by Employer*, including but not limited to, claims for damages and violations of state or federal laws and regulations related to harassment, wrongful termination, and/or discrimination (excluding claims for workers' compensation or unemployment insurance) *shall be determined and*

> *decided by final and binding arbitration* pursuant to the provisions of the Federal Arbitration Act, or to the extent applicable, state law. In order to fully benefit from the arbitration process, Associate and Employer understand that they are waiving all rights to a jury trial.
>
> "**II**. **How to Request Arbitration** - All disputes will be resolved by a single neutral Arbitrator. The Arbitrator shall be selected by agreement of the Associate and Employer, or by order of the court, if the Associate and Employer cannot agree. . . . [¶] . . . [¶]
>
> "**IV**. **Discovery** - The Arbitrator shall have the authority to order discovery that he/she deems adequate and necessary to enable each party to arbitrate the claims, including but not limited to depositions, interrogatories, or requests for production of documents. The Arbitrator shall also have the authority to rule on all discovery disputes and/or discovery motions. [¶] . . . [¶]
>
> "[**VI**]. **Severability** - In the event that any provision of this Agreement is determined by a court or the Arbitrator to be illegal, invalid, or unenforceable to any extent, such term or provision shall be enforced to the extent permissible under the law and all remaining terms and provisions hereof shall continue in full force and effect." (Italics added.)

The Agreement was included in dozens of pages of an employee manual, several of which Mohammadian and Spencer were asked to sign by Defendant. They were required to sign the Agreement and other documents as a condition to receive their paychecks for the then-current pay period.

In March 2010, Plaintiffs filed the instant action against Defendant. They subsequently filed the operative first amended complaint (Complaint), alleging five causes of action for: (1) unlawful deductions from wages in violation of Labor Code[1] section 221; (2) illegal record keeping in violation of section 226; (3) failure to pay

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1 All statutory references are to the Labor Code unless otherwise specified.

overtime compensation in violation of section 1194; (4) unfair business practices (Bus. & Prof. Code, § 17200 et seq.); and (5) civil penalties under the Private Attorneys General Act (§ 2698 et seq.) (PAGA) for violations of the Labor Code.

Defendant filed a petition to compel arbitration of all matters set forth in the Complaint. It argued that under the Agreement Plaintiffs agreed to arbitrate all disputes that may arise out of and are related to their employment by Defendant, which includes all claims covered by the Complaint. Plaintiffs opposed the petition, arguing: (1) the Agreement is unenforceable because it is unconscionable; (2) Defendant waived any right to arbitration because its conduct was inconsistent with arbitration and it unreasonably delayed in bringing its petition; and (3) their class action claims were not arbitrable under *Stolt-Nielsen S.A. v. AnimalFeeds International* (2010) ___ U.S. ___ [130 S.Ct. 1758] (*Stolt-Nielsen*) because the Agreement does not expressly provide for class arbitration.

Following oral argument on the petition to compel, the trial court issued an order requesting that the parties submit supplemental briefing on the following issues: (1) whether the Agreement is procedurally and substantively unconscionable; and (2) if the Agreement is enforceable, does state or federal law govern whether the court or the arbitrator determines if the Agreement allows for class arbitration. In Plaintiffs' supplemental brief, they argued that the Agreement is invalid because of fraud and/or duress. More importantly, they argued that because *Discover Bank* held an arbitration agreement containing a class action arbitration waiver is unconscionable and *Stolt-Nielsen* held class arbitration is implicitly waived if the arbitration agreement does not expressly provide for it, the Agreement is invalid and unenforceable under *Discover*

Bank. In support of their supplemental brief, Plaintiffs submitted Spencer's and Mohammadian's declarations regarding the circumstances leading to their execution of the Agreement. Defendant filed a supplemental brief, arguing the Agreement was neither procedurally nor substantively unconscionable and federal law requires that the arbitrator, and not the court, decide whether class arbitration is available.

On January 26, 2011, after hearing arguments of counsel, the trial court issued its minute order (Order) denying Defendant's petition to compel arbitration. The court disregarded Plaintiffs' fraud and duress argument because it was first raised in their supplemental brief and was outside the permitted scope for that brief. The court addressed the impact of *Discover Bank* and *Stolt-Nielsen* on the validity of the Agreement. It stated:

> "[I]n *Discover Bank*, the Court [held] that a waiver of class arbitration in an arbitration agreement was unconscionable as a matter of California law and that its holding was not preempted by the Federal Arbitration Act [FAA]. Even a cursory reading of the *Discover Bank* decision compels the conclusion that if an arbitration agreement is interpreted to preclude class arbitration, even in the absence of an explicit waiver, it, too, would be unconscionable."

The court noted that the question of whether the Federal Arbitration Act (FAA) preempted the *Discover Bank* rule was currently before the United States Supreme Court in *AT&T*. The court also noted that in *Stolt-Nielsen* the United States Supreme Court held that if an arbitration agreement was silent on the question of class arbitration, the parties had not agreed on class arbitration and therefore under the FAA class arbitration could not be compelled. The trial court then stated:

> "After reviewing those decisions, this Court concludes under current California law, an arbitration agreement would be substantively unconscionable if the result of the enforcement of the agreement would be to preclude class litigation either in court or before an arbitrator. [Citations.] And unconscionability is an issue for the trial court to determine. [Citation.]
>
> "An arbitration agreement is enforceable unless it is both procedurally and substantively unconscionable. [Citation.] In this case, the Court finds that the [Agreement] is procedurally unconscionable. Plaintiff was forced to sign the [Agreement] 'in consideration of the employment relationship.' The [A]greement was presented on a 'take-it-or-leave-it' basis as a condition of continued employment with [Defendant]. Plaintiffs were asked to sign the [A]greement on the spot and were presented with a single page of an employee manual. They had no meaningful opportunity to negotiate or reject the terms of the [Agreement], because they were told that if they didn't sign the [A]greement, they wouldn't receive their paychecks. [Citations.]
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> "With respect to substantive unconscionability, the [Agreement] contains no specific agreement for class arbitration. Accordingly, *Stolt-Nielsen* compels the conclusion that as a matter of federal law, class arbitration could not be enforced by the arbitrator. If there can be no class arbitration, then, as a matter of current California law, the [Agreement] is substantively unconscionable. See *Discover Bank*[, *supra*,] 36 Cal.4th at [pp.] 170-171. . . ."

Based on that reasoning, the trial court denied the petition to compel arbitration.

Defendant timely filed a notice of appeal.

DISCUSSION

I

The Impact of AT&T on the Trial Court's Reasoning

Defendant contends the United States Supreme Court's decision in *AT&T*, issued after the Order, overruled the *Discover Bank* rule and therefore undermined the trial court's reasoning in support of the Order.

A

Discover Bank. In *Discover Bank*, the plaintiff filed a class action against the bank alleging deceptive consumer credit card practices. (*Discover Bank, supra*, 36 Cal.4th at pp. 152-154.) After the bank successfully moved to compel arbitration pursuant to its arbitration agreement with the plaintiff, the plaintiff sought to compel class arbitration of the dispute. (*Id*. at pp. 152, 155.) The arbitration agreement expressly precluded class actions and class arbitration. (*Id*. at pp. 152-154.) In *Discover Bank*, the California Supreme Court held that "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." (*Id*. at p. 153.) The court noted that although "[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses," they are indisputably one-sided and "[s]uch one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable." (*Id*. at p. 161.) Accordingly, under certain circumstances, "such waivers are unconscionable under California law and should not be enforced." (*Id*. at p. 163.)

Discover Bank further concluded the FAA did not preempt its interpretation of California law. (*Discover Bank, supra,* 36 Cal.4th at p. 163.) It stated: "[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action

litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." (*Id*. at pp. 165-166.) *Discover Bank* noted "the FAA does not federalize the law of unconscionability or related contract defenses except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses." (*Id*. at p. 167.) Because its principle of California law precluding class action or class arbitration waivers as unconscionable in certain cases did not discriminate against arbitration clauses, *Discover Bank* concluded the FAA did not preempt that principle. (*Ibid*.)

AT&T. On April 27, 2011, the United States Supreme Court issued its opinion in *AT&T*. The court addressed the issue of "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." (*AT&T, supra*, ___ U.S. at p. ___ [131 S.Ct. at p. 1744].) *AT&T* involved a consumer cellular telephone contract that provided for arbitration of all disputes, but limited such arbitration to individual claims and expressly precluded any purported class or representative proceeding. (*Ibid*.) Relying on *Discover Bank*, the federal district court denied AT&T's petition to compel arbitration of the consumer claims against it. (*AT&T*, at p. ___ [131 S.Ct. at pp. 1744-1745].) The United States Supreme Court granted certiorari after the Ninth Circuit Court of Appeals affirmed the district court. (*Id*. at p. ___ [131 S.Ct. at p. 1745].)

In *AT&T*, the Supreme Court quoted section 2 of the FAA, which provides that an agreement to arbitrate " 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' " (*AT&T, supra*,

___ U.S. at p. ___ [131 S.Ct. at p. 1745].) That final phrase or savings clause "permits arbitration agreements to be declared unenforceable" and invalid "by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Id*. at p. ___ [131 S.Ct. at p. 1746].) *AT&T* noted that under California law courts may refuse to enforce a contract that is unconscionable, which requires a finding of both procedural and substantive elements of unconscionability. (*Ibid*.)

Summarizing the FAA's preemption of certain state laws that affect arbitration, the United States Supreme Court stated in *AT&T*:

> "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. [Citation.] But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." (*AT&T, supra*, ___ U.S. at p. ___ [131 S.Ct. at p. 1747].)

The court in *AT&T* illustrated that principle with a hypothetical state case holding "unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. . . . [T]he court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. See *Discover Bank*, *supra*, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1109 (arguing that class waivers are

similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to 'any' contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." (*Ibid*.) *AT&T* stated:

> "Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." (*AT&T*, *supra*, ___ U.S. at p. ___ [131 S.Ct. at p. 1748].)

In particular, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (*Ibid*.) Because the FAA was designed to promote arbitration and ensure that private arbitration agreements are enforced according to their terms, there is " 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary' [citations]." (*Id*. at pp. ___-___ [131 S.Ct. at pp. 1748-1749].)

Based on those general principles, *AT&T* concluded that "California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. The rule is limited to adhesion contracts [citation], but the times in which consumer contracts were anything other than adhesive are long past." (*AT&T, supra,* ___ U.S. at p. ___ [131 S.Ct. at p. 1750], fn. omitted.) The court noted that in *Stolt-Nielsen* it held an

arbitration agreement, "which was silent on the question of class procedures, could not be interpreted to allow them because the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.' [Citation.]" (*AT&T*, at p. ___ [131 S.Ct. at p. 1750].) Accordingly, "[t]he conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." (*Id*. at pp. ___-___ [131 S.Ct. at pp. 1750-1751].) *AT&T* then discussed the many disadvantages of class arbitration of disputes (e.g., it makes arbitration slower, more costly, more procedurally formal, and riskier for defendants). (*Id*. at pp. ___-___ [131 S.Ct. at pp. 1751-1752].) The court stated: "Arbitration is poorly suited to the higher stakes of class litigation." (*Id*. at p. ___ [131 S.Ct. at p. 1752].) "States cannot require a procedure [e.g., class arbitration] that is inconsistent with the FAA, even if it is desirable for unrelated reasons." (*Id*. at p. ___ [131 S.Ct. at p. 1753].) Accordingly, *AT&T* concluded: "Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' [citation], California's *Discover Bank* rule is preempted by the FAA." (*Ibid*.)

B

Although the United States Supreme Court's decision in *AT&T* did not involve a wage and hour dispute or expressly address the instant issue in this case, we conclude its reasoning and its express abrogation of the *Discover Bank* rule undermine the trial court's reasoning in support of the Order. As noted above, the trial court here found the Agreement was unenforceable as unconscionable under California law because it was substantively unconscionable based on its implicit waiver of class arbitration per *Stolt-*

Nielsen (i.e., because of the absence of an express agreement for class arbitration), which waiver was in violation of the *Discover Bank* rule rejecting such waivers in certain cases involving adhesive contracts. However, because *AT&T* subsequently abrogated that *Discover Bank* rule, an explicit or implicit waiver of class arbitration is not a valid basis on which to conclude an arbitration agreement is unconscionable. Accordingly, we conclude the trial court's reliance on *Discover Bank* was in error and cannot support the Order.

Contrary to Plaintiffs' assertion, the fact that *AT&T* involved a consumer cellular telephone contract dispute, and not a wage and hour employment dispute, does not alone provide a basis on which to avoid the broad holding in *AT&T*. *AT&T* stated that because the FAA reflects a federal policy favoring arbitration, "courts must place arbitration agreements on an equal footing with other contracts [citation] and enforce them according to their terms [citation]." (*AT&T*, *supra*, ___ U.S. at p. ___ [131 S.Ct. at pp. 1745-1746].) Accordingly, "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" and treat arbitration agreements less favorably than other types of contracts are, in general, preempted by the FAA. (*Id*. at pp. ___-___ [131 S.Ct. at pp. 1748, 1753].) Broadly construed, *AT&T*, in effect, held that the FAA preempts any California (or other state) law or rule that disfavors, or stands as an obstacle to, arbitration by deeming unconscionable an arbitration agreement that waives, explicitly or implicitly, class arbitration. That broad holding is not limited to provisions in consumer contracts. Accordingly, the trial court in this case erred by denying the petition to compel arbitration based on that reasoning.

II

Possible Alternative Grounds on Which to Affirm the Order

Plaintiffs assert we should affirm the Order because there are alternative legal theories or grounds to support it other than the trial court's reasoning based on the now-abrogated *Discover Bank* rule. (*J. B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 328-329.) They argue the Agreement is: (1) unconscionable even if the *Discover Bank* rule is disregarded; (2) unenforceable because it was the result of fraud and/or duress; (3) unenforceable as against public policy because its implicit waiver of class arbitration had the effect of waiving Plaintiffs' statutory rights (see *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 457, 463-466); (4) unenforceable in whole or in part because it waived Plaintiffs' statutory right to bring a representative action under PAGA; and (5) unenforceable because its implicit waiver of class arbitration violates the National Labor Relations Act (NLRA). They also argue Defendant waived its right to seek arbitration by acting inconsistently with its right to compel arbitration.

We decline to decide in the first instance the question of whether the Agreement is unconscionable under California law after *AT&T*'s abrogation of the *Discover Bank* rule. Because *AT&T* did not abrogate all California law regarding unconscionable contracts, the doctrine of unconscionability remains intact, except to the extent *AT&T* abrogated the *Discover Bank* rule, and its reasoning precludes application of those laws or rules that disfavor, or stand as an obstacle to, arbitration in violation of the FAA. Accordingly, a court may find an adhesive contract that is procedurally and substantively unconscionable

to be unconscionable, revocable, and unenforceable under California law, provided the court does not rely on laws or rules that disfavor arbitration. (See, e.g., Civ. Code, § 1670.5[2]; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114.) Furthermore, "Civil Code section 1670.5, subdivision (a) gives the *trial court discretion* to either refuse to enforce a contract it finds to be unconscionable, or to strike the unconscionable provision and enforce the remainder of the contract. . . . The *trial court has discretion* under this statute to refuse to enforce an entire agreement if the agreement is 'permeated' by unconscionability." (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 826, italics added.)

In this case, the trial court denied Defendant's petition to compel arbitration based on its finding the Agreement was both procedurally and substantively unconscionable. In so doing, the trial court implicitly exercised its discretion under Civil Code section 1670.5 to not enforce the entire Agreement. However, because we have concluded the trial court erred in relying on the *Discover Bank* rule in finding the Agreement was substantively unconscionable, we believe it is appropriate to remand the disputed matter of the Agreement's unconscionability and enforceability to the trial court to decide anew

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[2] Civil Code section 1670.5 provides: "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [¶] (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."

whether the Agreement is unconscionable under California law (and, in so doing, disregard the *Discover Bank* rule and follow *AT&T*'s reasoning as discussed above) and, if so, whether to exercise its discretion to refuse to enforce all or part of the Agreement. Contrary to Defendant's assertion, we cannot conclude on this record that, as a matter of law, the Agreement is not unconscionable.

We conclude it is also appropriate for the trial court to consider on remand whether the Agreement is unenforceable in whole or in part because it waived Plaintiffs' statutory right to bring a representative action under PAGA.[3] Although, as Defendant notes, Plaintiffs did not raise this legal theory below in opposing its petition to compel arbitration, this question of law on undisputed facts involves an important issue of public policy or public concern and therefore may be raised by Plaintiffs at any time. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn. 3 ["parties may advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy"]; *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227-1228 [considered new argument regarding enforceability of surrogacy contracts because it involves public and legal concerns].) To avoid prejudice

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3 "[T]he PAGA allows a plaintiff employee to collect [civil] penalties not only for himself, but also for other current and former employees. The representative action authorized by the PAGA is an enforcement action, with one aggrieved employee acting as a private attorney general to collect penalties from employers who violate the Labor Code." (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 499.) Therefore, a PAGA claim is a representative, and not an individual, cause of action prosecuted against an employer by a current or former employee, on behalf of himself or herself *and* other current or former employees, to enforce the Labor Code.

to Defendant resulting from this new issue raised in Plaintiffs' respondents brief, we believe the issue would be best addressed in the first instance in the trial court on remand so that both parties will have the opportunity to fully brief and argue the legal (and any factual) issues the court did not originally consider in denying the petition to compel. (Cf. *In re Marriage of Moschetta, supra,* at p. 1228.)

Furthermore, two of the issues raised by Plaintiffs require legal and factual determinations that the trial court should make in the first instance. Although Plaintiffs expressly argued below that Defendant waived its right to arbitrate their claims by acting inconsistently with that right (e.g., by engaging in litigation and waiting seven months before filing the petition to compel arbitration), the trial court did not decide that mixed legal and factual issue in the Order. Likewise, the trial court refused to consider, and did not decide, Plaintiffs' fraud and/or duress argument first raised below in their supplemental brief and outside the permitted scope of that brief. Because there appears to be some ambiguity in this regard, on remand the trial court may, in its discretion, allow the parties to submit additional briefing and/or evidence on either or both of those issues.[4] Unless the court refuses to enforce the Agreement on other grounds, the trial court should then decide whether Defendant has, in fact, waived its right to arbitrate Plaintiffs' claims and, in the court's discretion, may also decide whether the Agreement is unenforceable because of fraud and/or duress.

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4 For example, the court declined to consider fraud and duress but relied on Plaintiffs' declarations asserting duress in support of its finding on procedural unconscionability.

Finally, regarding Plaintiffs' *Gentry* and NLRA arguments (neither of which were raised below), on remand the trial court may, in its discretion, allow the parties to submit additional briefing and/or evidence on either or both of those issues. Unless the court refuses to enforce the Agreement on other grounds, the trial court may then decide the merits of those arguments and whether all or part of the Agreement is unenforceable.

DISPOSITION

The order is reversed and the matter is remanded with directions that the superior court conduct further proceedings as discussed in this opinion. The parties shall bear their own costs on appeal.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.